

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS**

HARVEY BREWER,

Petitioner,

v.

**Civil Action No. 2:11-cv-35
(BAILEY)**

**KUMA J. DEBOO, *Warden*,
J. HINKEL, *Officer, S.O.*, and
M.C. WHINNARY, *Lieutenant, SIS***

Respondents.

**ORDER OVERRULING OBJECTIONS TO THE REPORT AND RECOMMENDATION
AND ORDER ADOPTING REPORT AND RECOMMENDATION**

This case is pending before this Court on the Opinion/Report and Recommendation (hereinafter “R&R”) filed by Magistrate Judge David J. Joel [Doc. 11] and the Petitioner’s Objections to Report and Recommendation [Doc. 13] regarding petitioner’s Application for Leave to Proceed *in forma pauperis* [Doc. 2]. After reviewing the R&R, the record, and the arguments of the parties, the Court finds that petitioner’s objections to the R&R should be **OVERRULED**, the R&R should be **ADOPTED**, and petitioner’s request to proceed without prepayment of fees should be **DENIED**, and defendant is **ORDERED** to pay the full filing fee of \$350.00.

Pursuant to 28 U.S.C. § 636 (b) (1) (c), this Court is required to make a *de novo* review of those portions of the magistrate judge’s findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the

factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. **Thomas v. Arn**, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); **Snyder v. Ridenour**, 889 F.2d 1363, 1366 (4th Cir. 1989); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984). Here, objections to Magistrate Judge Joel's R & R were due within fourteen (14) days of receipt. The docket indicates that the petitioner accepted service of the R & R on May 18, 2011. [Doc. 12]. Petitioner timely filed objections on May 23, 2011. [Doc. 13]. Accordingly, this Court will conduct a *de novo* review of those portions to which the petitioner objected. This Court will review the remaining portions of the report and recommendation for clear error.

On April 25, 2011, the *pro se* plaintiff, Harvey Brewer, filed a complaint with the Court and an Application for Leave to proceed *in forma pauperis*. [Docs. 1-2]. On May 5, 2011, the petitioner filed a Prisoner Trust Account Fund Statement and Consent to Collection of Fees [Doc. 6]. On May 17, 2011, the petitioner filed his Prisoner Trust Fund Ledger Sheets. [Doc. 7].

The ledger sheets reveal that the petitioner had an account balance of \$1640.87 as of May 15, 2011. [Docs. 6-7]. On April 29, 2011, the Business Administrator at FCI Gilmer indicated that the petitioner's balance was \$1673.72, with an average monthly balance of \$1132.17 during the preceding six months. Consequently, the magistrate judge found that petitioner had sufficient funds to pay the \$350.00 filing fee.

In the plaintiff's objections, he claims he is unable to earn additional income as he

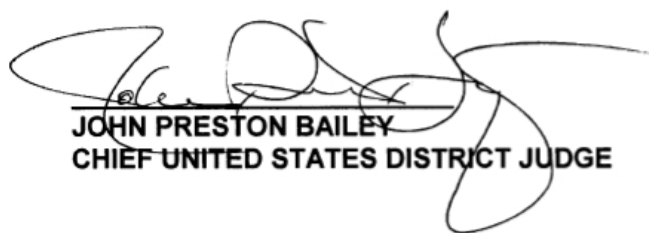
is being housed in the Special Housing Unit. He also states that the money in his account was provided by family members and he is unsure when he might receive more funds. [Doc. 13]. Based upon this information, the Court is not persuaded that plaintiff is unable to pay the filing fee.

Upon careful review of the report and recommendation, it is the opinion of this Court that the Magistrate Judge's Report and Recommendation [**Doc. 11**] should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Accordingly, this Court hereby **DENIES** the motion for leave to proceed *in forma pauperis* [**Doc. 2**]. As such, the plaintiff's Objections [**Doc. 13**] are **OVERRULED**. Accordingly, the Court cautions the plaintiff that failure to pay the full filing fee of \$350.00 within thirty (30) days will result in the dismissal of his Complaint.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a copy to the *pro se* petitioner.

DATED: June 29, 2011


JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE